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Daily News

Manufacturer Expected To Seek Rare EPA Hearing On Rodenticide Ban

Posted: January 31, 2013

Reckitt Benckiser Inc. is expected to exercise its right to a rarely sought administrative hearing over EPA's recent efforts to ban sales of the company's 12 consumer-use rodenticides, a resource intensive process that sources say will divert personnel away from other pesticide program priorities and delay efforts to cancel the products' registrations.

“Reckitt has repeatedly stated that it disagrees with EPA's scientific assessment and legal conclusions, and brought litigation seeking an administrative hearing after issuance of the 2008 Risk Mitigation Decision, so it is virtually certain that Reckitt will submit the requisite hearing request,” the law firm Bergeson & Campbell says in a Jan. 30 commentary.

“Reckitt can be expected to contend that there is little scientific support for EPA's conclusions and to highlight the higher efficacy and lower cost of products that are not compliant with the EPA position.”

The law firm, which has represented *amicus* parties that have supported Reckitt in past litigation, adds that because the hearing process is so resource intensive, requiring discovery and expert witness testimony, it could divert agency resources away from other key pesticide program efforts. “As the hearing process gets underway, it could consume a significant amount of program management's time and attention, which could ultimately affect the program's ability to meet deadlines or deal with other matters,” the law firm's memo says. The memo calls EPA's notice of intent to cancel (NOIC) “one of the most significant

cancellation actions EPA has taken in many years."

The company's expected actions are unusual because in most cases manufacturers reach voluntary agreements with EPA about changes to their registrations in order to preserve their products' market access. Reckitt, however, is one of a handful of companies that have challenged EPA's risk mitigation efforts regarding products regulated by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

In this case, EPA announced Jan. 30 that it will issue a NOIC for Reckitt's 12 D-Con products, following the company's refusal to comply with risk mitigation procedures EPA issued in 2008 for certain anticoagulant rodenticides.

The agency's 2008 risk management decision allows the anticoagulant rodenticides to be applied by professional exterminators, but restricts their use in products that consumers can purchase. In particular, EPA prohibited sale of four so-called second-generation anticoagulant chemicals and required companies that produced consumer rodenticides as loose pellets to package them in "bait stations" in order to reduce children's and pets' exposure to the rodenticides.

The pending cancellation under section 6 of FIFRA, in which with EPA is trying to scrap registrations for 12 rodenticide products registered by Reckitt as well as two registration applications, is one of less than a handful of times the agency has attempted a product cancellation in more than two decades.

Cancellation does not appear to be the agency's preferred method for making the company adopt its rules, but a federal court in 2010 ruled in *Reckitt Benckiser v. EPA* that the agency could not use an enforcement action to mandate compliance with its FIFRA rules, forcing the agency to turn to more burdensome section 6 proceedings.

Accidental Exposures

But James Jones, EPA's acting toxics chief, argued in a Jan. 30 press release that cancellations are necessary to prevent "completely avoidable risks to children." The statement adds that 10,000 children are accidentally exposed to rodenticide baits each year, and EPA notes that it has received "no reports of children being exposed to bait contained in bait stations" produced by the companies that complied with the new standards in 2011, a significant reduction from past years when the pellets were sold without bait stations.

"EPA expects to see a substantial reduction in exposures to children when the 12 D-Con products that do not comply with current standards are removed from the consumer market as millions of households use these products each year," EPA says.

"EPA has worked cooperatively with companies to ensure that products are both safe to use around children and effective for consumers," the statement says. "Reckitt Benckiser Inc., maker of D-Con brand products, is the only rodenticide producer that has refused to adopt EPA's safety standards for all of its consumer use products."

But Bergeson & Campbell says it expects Reckitt will continue to fight EPA's efforts. Once EPA issues its NOIC in the *Federal Register*, "Reckitt will have 30 days to request a hearing before an EPA Administrative Law Judge," the law firm's commentary says.

The administrative hearing will require the agency to conduct cost-benefit analysis and to consult broadly with its science advisers and other government agencies. The Agriculture Department (USDA) and Centers for Disease Control & Prevention (CDC) have already provided comments supporting EPA, according to documents EPA released Jan. 30.

EPA's measure is “reasonable and is supported by strong concerns and solid data about rodenticide poisoning of children and secondary toxic effect to wildlife from second-generation anticoagulants,” according to 2007 comments CDC resubmitted to EPA last April. “We believe that any economic disadvantages from implementation of this proposal would be outweighed by the public health and environmental benefits that result from the new rodenticide regulations.”

USDA stated simply that it “is satisfied with the content of these documents and has no further comment,” in comments submitted to EPA last April.

While Reckitt is expected to fight EPA's cancellation order, the agency's actions have split industry groups with some, like the National Pest Management Association (NPMA) and its members, supporting EPA.

In a Jan. 30 press release, the trade association backs EPA's NOIC, saying “the cancellation has been under extensive study and review to ensure a final action in the best interest of American public health.” It notes that since 1998, NPMA has voluntarily complied with EPA efforts “to ensure that all registered products meet today's health and safety standards.”

A source with NPMA welcomed EPA's decision, saying if the agency had backed down from its earlier threats, it would have eliminated the agency's leverage to encourage registrants to voluntarily comply. “I think this was a decision that was not made easily by EPA, but they are filing to follow through” with their threats to Reckitt to cancel the registrations unless Reckitt complied with the risk mitigation decisions, the source adds. “If they back down [when challenged] there is no more implied threat.”

But the source says that if Reckitt seeks hearings, it will be “a big, final process that will strain whatever resources are available to [EPA].” -- *Maria Hegstad*